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No. 97-7541

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

AMANDA MITCHELL, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RESPONSE REQUESTED

18 pp

QUESTIONS PRESENTED

1. Whether petitioner was entitled to assert the Fifth Amendment privilege against compelled self-incrimination at the sentencing hearing on her cocaine distribution conspiracy conviction on the ground that she was still exposed to prosecution on other charges.

2. Whether, after pleading guilty to distributing cocaine but reserving the right to contest the amount of cocaine involved, petitioner had a Fifth Amendment privilege not to testify at sentencing about the amount of cocaine because that testimony might adversely affect her sentence.

(I)

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1-15) is reported at 122 F.3d 185.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1997. A petition for rehearing was denied on October 17, 1997. The petition for a writ of certiorari was filed on January 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted

on three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a), and one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to ten years' imprisonment, to be followed by six years' supervised release. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner and 22 other defendants were indicted for their roles in a cocaine distribution conspiracy that operated between 1989 and 1994 in Allentown, Pennsylvania. Petitioner was charged in Count 1 with conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, and in Counts 11, 21, and 28 with separate instances of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a). Pet. App. 2.

Petitioner pleaded guilty, without a plea agreement, to all four counts in which she was charged, but reserved the right to contest the quantity of cocaine attributable to her on the conspiracy count. 10/16/95 Tr. 7. The court advised petitioner that the quantity determination would be made following a sentencing hearing (*ibid.*), and that her guilty plea exposed her to substantial punishment "depending on the quantity involved" (*id.* at 12). The court and the prosecutor informed petitioner of the penalties for her offenses (*id.* at 6-14, 24), including the ten-year mandatory minimum sentence under 21 U.S.C. 841 for distribution of at least five kilograms, but less than 15 kilograms, of cocaine (*id.* at 6-8, 12). The court also explained

to petitioner that she would waive various rights by pleading guilty, including her Fifth Amendment right not to testify. *Id.* at 14-16. The court stated in that respect that "[y]ou have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy." *Id.* at 16.

Nine of petitioner's co-defendants went to trial. Much of the trial testimony centered on the activities of Harry Riddick, the alleged leader of the cocaine distribution ring. Three of the original co-defendants, who had pleaded guilty and agreed to cooperate with the government, testified that petitioner was one of Riddick's regular sellers. Shannon Riley testified that she had often seen petitioner at Phill's Bar and Grill, the headquarters of the cocaine distribution ring, going into the bathrooms to sell cocaine. Paul Belfield testified that, when he was selling cocaine for Riddick in 1991 and 1992, petitioner delivered the cocaine to him. Richard Thompson testified that petitioner sold one-and-a-half ounces of cocaine to customers two or three times a week from April 1992 through December 1993. Pet. App. 4-5.

At petitioner's sentencing hearing, those witnesses adopted their trial testimony. In addition, Thompson testified that, between April 1992 and August 1992, petitioner had worked two or three times a week, selling one-and-a-half to two ounces of cocaine each time. He also testified that, between August 1992 and December 1993, petitioner had worked three to five times a week. And he testified that petitioner was one of those in charge of

cocaine distribution from January 1994 through March 1994. The government also proffered the trial testimony of Alvitta Mack, who stated that, in 1992, she had received three deliveries of cocaine, totaling two ounces, from petitioner. Pet. App. 5.

Petitioner did not offer any evidence at the sentencing hearing and did not testify to rebut the government's evidence about drug quantity. Rather, petitioner, through counsel, argued that the testimony regarding her three small sales to Mack was the only evidence sufficiently reliable to be credited in determining the quantity of cocaine attributable to her for sentencing purposes. Pet. App. 5.

The district court rejected petitioner's arguments. The court found that the testimony identifying petitioner as a drug courier on a regular basis over an extended period was credible and that her sales of one-and-a-half to two ounces of cocaine twice a week for a year and a half put her "well over five kilograms." Pet. App. 6; 7/2/96 Tr. 57. The court stated that "[o]ne of the things" that persuaded it to credit the testimony of Riley, Belfield, and Thompson was petitioner's "not testifying to the contrary." Pet. App. 6; 7/2/96 Tr. 61; see also Pet. App. 7; 7/2/96 Tr. 65 (advising petitioner that "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times"). The court reasoned that petitioner had no Fifth Amendment right not to have her silence at the sentencing hearing considered against her, because "once a criminal defendant in a felony charge pleads guilty, then that defendant * * * no longer

has a Fifth Amendment right to remain silent." Pet. App. 6; 7/2/96 Tr. 60. The court explained to petitioner that "without anything from you and with my understanding of the Riddick cocaine organization, I think you were involved in more than five kilograms of cocaine." 7/2/96 Tr. 66.

The court then made a finding that petitioner had participated in the distribution of almost 13 kilograms of cocaine during the conspiracy. Pet. App. 7; 7/2/96 Tr. 66. The court accordingly imposed a sentence of ten years' imprisonment -- the minimum term applicable when the quantity of cocaine involved is five kilograms or more. Pet. App. 7; see 21 U.S.C. 841(b)(1)(A)(ii).

2. The court of appeals affirmed. The court rejected petitioner's claim that the district court erred in considering her failure to testify at the sentencing hearing. Pet. App. 7-13. The court observed that, "if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege." *Id.* at 8 (citing Ullmann v. United States, 350 U.S. 422, 431 (1956)). The court also noted that a defendant who has pleaded guilty to an offense "waives his privilege as to the acts constituting it" once he has been advised by the trial court of the rights that he relinquishes by such a plea, and that petitioner did not dispute that she had been fully advised of the consequences of her guilty plea, including her relinquishment of her Fifth Amendment right to remain silent. Pet. App. 8. Nor did petitioner contend that her plea was not knowing and intelligent. *Ibid.*

The court of appeals acknowledged the general principle that a defendant's plea of guilty to one offense does not waive the Fifth Amendment privilege with respect to other offenses. Pet. App. 10. The court reasoned, however, that the Fifth Amendment's directive that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" does not "extend[] to testimony that would have an impact on the appropriate sentence for the crime of conviction." *Id.* at 12. The court noted that petitioner "does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense, see 18 Pa. C.S.A. § 111." *Ibid.*; see also *id.* at 13 (observing that petitioner "does not claim that she exposed herself to future federal or state prosecution").¹ And the court concluded that the amount of cocaine involved in petitioner's distribution conspiracy offense, while affecting the severity of her sentence, "is not an issue of independent criminality to which the Fifth Amendment applies." *Id.* at 12.²

The court of appeals noted that decisions from other circuits had allowed a witness to assert the Fifth Amendment privilege after

¹ The Pennsylvania statute cited by the court of appeals bars, with certain exceptions not applicable here, a state prosecution following a federal conviction based on the same conduct.

² The court of appeals found that petitioner's reservation of the issue of drug quantity at the time of her plea did not compel a different result. The court explained that, "[w]hile [petitioner's] reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." Pet. App. 12.

a guilty plea. The court also noted, however, that "in most instances * * * the witness would have been at risk of prosecution on other offenses." Pet. App. 11. The court rejected those courts' suggestion that an individual could assert the Fifth Amendment privilege solely because his testimony could be used to enhance his sentence. *Id.* at 11.

The court of appeals also rejected petitioner's claim that the evidence was insufficient to support the district court's finding that she had distributed nearly 13 kilograms of cocaine. The court observed that the district court had found credible the testimony of four witnesses that petitioner sold cocaine on a regular basis, including Thompson's testimony that petitioner sold one-and-a-half to two ounces of cocaine on two to five days per week between April 1992 and March 1994. In addition, the court noted that the district court could infer that those amounts were reliable from petitioner's refusal to offer any evidence to the contrary. Pet. App. 13-14.

Judge Michel, in a concurring opinion, agreed with the majority that "ordinarily a guilty plea waives the privilege as to all facts concerning the transactions alleged in an indictment," but he questioned whether that rule applied in this case given petitioner's reservation of the quantity issue at the time of her guilty plea. But Judge Michel deemed it unnecessary to resolve that issue. He concluded that any error in that regard was harmless because "the evidence amply supported [the district

court's] finding on quantity," apart from petitioner's silence. Pet. App. 15.

ARGUMENT

Petitioner contends that the district court violated her Fifth Amendment privilege against compelled self-incrimination by adversely considering her refusal to testify at the sentencing hearing about the quantity of drugs involved in the cocaine distribution conspiracy offense to which she had pleaded guilty. That claim does not warrant further review.

1. Although petitioner now claims (Pet. 14-15) that she retained a Fifth Amendment privilege at sentencing because her testimony could have subjected her to additional federal and state drug charges, she did not present that claim to the district court or the court of appeals. Indeed, the court of appeals expressly noted petitioner's failure to make such a claim, stating that she "does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense." Pet. App. 13. The court therefore did not address the question whether petitioner had a Fifth Amendment privilege to avoid giving testimony that could subject her to further criminal prosecution. Instead, the court addressed only whether petitioner retained a Fifth Amendment privilege after her guilty plea with respect to testimony that might affect her sentence for the offense to which she had pleaded guilty.

Because petitioner's claim that her testimony could have been used against her in additional prosecutions was not raised below or addressed by the court of appeals, that claim is not properly presented to this Court. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Indeed, if the court of appeals had been presented with a credible claim that petitioner's testimony at sentencing would have subjected her to further criminal charges, the court presumably would have held, in accordance with its own precedents, that petitioner had a Fifth Amendment right to refuse to testify. See Pet. App. 10 (recognizing that "a defendant's plea of guilty to one offense does not 'by its own force . . . waive a privilege with respect to other alleged transgressions'" (quoting United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978))).

2. Petitioner also contends (Pet. 8-13, 17-19) that she retained a Fifth Amendment privilege even after her guilty plea with respect to testimony that might adversely affect her sentence, and that the district court therefore erred in considering her failure to testify at the sentencing hearing concerning the quantity of drugs involved in the cocaine distribution conspiracy offense.

The court of appeals correctly held that, "by voluntarily and knowingly pleading guilty to the offense, [petitioner] waived her Fifth Amendment privilege" with respect to the acts constituting that offense for all further proceedings in the case. Pet. App. 8.

"A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination," McCarthy v. United States, 394 U.S. 459, 466 (1969), and consequently has "[n]o Fifth Amendment privilege" to "refus[e] to provide information on the count to which he had admitted his guilt," United States v. Trujillo, 906 F.2d 1456, 1461 (10th Cir. 1990), cert. denied, 498 U.S. 962 (1990). See United States v. Rodriguez, 706 F.2d 31, 36 (2d Cir. 1983) (a defendant's guilty plea waives the Fifth Amendment privilege "with respect to the crime to which the guilty plea pertains," so that "if such crime is the only one for which the defendant is potentially liable, he can be forced to testify") (quoting Yurasovich, 580 F.2d at 1218); United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982) ("[a] voluntary guilty plea * * * is a waiver of the fifth amendment privilege * * * in regard to the crime that is admitted").

The defendant's waiver of the privilege is reflected in Federal Rule of Criminal Procedure 11, which governs a district court's acceptance of a defendant's plea of guilty. In order to accept a guilty plea, the court must be satisfied that "there is a factual basis for the plea," which the court may ascertain by "question[ing] the defendant under oath * * * about the offenses to which the defendant has pleaded." Fed. R. Crim. P. 11 (c)(5), (f). It would make no sense to conclude that the defendant's waiver of the Fifth Amendment privilege, while applicable at the change of plea proceeding if the defendant is questioned about the offense to

which he has pleaded guilty, ceases to be applicable at sentencing if the defendant is asked to supply additional details about that offense. See Rogers v. United States, 340 U.S. 367, 373 (1951) ("Disclosure of a fact waives the privilege as to details.").³

Petitioner's assertion that the decision below conflicts with Estelle v. Smith, 451 U.S. 454 (1981), is incorrect. That case involved the prosecution's use of the defendant's statements during at a court-ordered pretrial psychiatric evaluation to prove the defendant's future dangerousness in the sentencing phase of a capital murder trial. The Court held that the admission of those compelled and "unwarned" statements at sentencing violated the defendant's Fifth Amendment privilege, rejecting the State's argument that the privilege did not apply because the defendant's guilt had already been adjudicated. Id. at 463; see id. at 462-463 ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). The defendant in Estelle v. Smith, unlike petitioner here, had not pleaded guilty and thereby waived his Fifth Amendment privilege. See id. at 457 (noting that defendant had been convicted of murder by a jury). The Court's decision does not, therefore, address

³ Petitioner's reservation of the drug quantity issue for determination at the sentencing hearing does not alter the effect of her guilty plea as a waiver of the Fifth Amendment privilege. As the court of appeals held, "[w]hile her reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." Pet. App. 12.

whether the privilege continues in effect following a plea of guilty, particularly in a non-capital sentencing proceeding.⁴

3. Petitioner also contends (Pet. 17-19) that the decision below conflicts with decisions of other circuits that permitted an individual who has pleaded guilty to an offense to assert the Fifth Amendment privilege to avoid giving testimony that could adversely affect his sentence.

a. The only case cited by petitioner that involves analogous circumstances is United States v. Garcia, 78 F.3d 1457 (10th Cir.), cert. denied, 116 S. Ct. 1888 (1996), where a defendant who had pleaded guilty challenged the district court's adverse consideration of his failure to testify at sentencing. The court of appeals, while stating that a defendant's Fifth Amendment privilege "continues during sentencing even where the defendant has pled guilty to a crime," *id.* at 1463, ultimately ruled against the defendant and affirmed the sentence imposed. It concluded that the district court's consideration of the defendant's failure to testify was harmless error in light of the evidence supporting the sentencing findings. *Id.* at 1464-1465. There is thus no conflict between the outcomes of this case and Garcia.⁵

⁴ In reaching its decision that the Fifth Amendment applied at the capital sentencing phase in Estelle v. Smith, the Court recognized "[t]he gravity of the decision to be made at the penalty phase" in such cases, and concluded that the Fifth Amendment protects a criminal defendant "from being made the 'deluded instrument' of his own execution." 451 U.S. at 462.

⁵ Garcia also failed to cite the Tenth Circuit's earlier decision in Trujillo, *supra*, which is consistent with this case both in rationale and result. In Trujillo, a defendant refused, in a presentence interview with a probation officer, to make a

b. The remaining cases cited by petitioner involved individuals who pleaded guilty and then invoked the Fifth Amendment privilege to refuse to testify at the trial of a co-defendant or in another separate proceeding. Unlike this case, they did not involve a defendant who pleaded guilty, refused to testify at her own sentencing hearing, and then had the court draw adverse inferences from her silence in imposing her sentence.⁶ "It is settled that a waiver of the Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs." United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); see In re Morganroth, 718 F.2d 161,

statement about the offense to which he had pleaded guilty, and the probation officer consequently recommended that the defendant not receive a reduction in offense level for acceptance of responsibility. The district court accepted the probation officer's recommendation, and the court of appeals affirmed, rejecting the defendant's argument that the Fifth Amendment prevented the district court from adversely considering his silence at the presentence interview. The court of appeals explained that "[n]o Fifth Amendment privilege exists" where a defendant, after pleading guilty, "was refusing to provide information on the count to which he had admitted his guilt." 906 F.2d at 1461. The court also held that a sentence reduction is not, in any event, a "penalty" for purposes of the Fifth Amendment. *Ibid.*

⁶ This Court has ruled that the Fifth Amendment protects a defendant from having his silence considered against him at the guilt phase of his criminal trial, Griffin v. California, 380 U.S. 609 (1965), but has not addressed whether Griffin also applies at the sentencing phase. In other contexts outside the guilt phase of a criminal trial, the Court has ruled that, even where the Fifth Amendment privilege prevents compelling an individual to testify against himself, the privilege permits drawing adverse inferences from the individual's refusal to testify. See Baxter v. Palmigiano, 425 U.S. 308, 316-318 (1976) (state prison disciplinary hearing). Accordingly, even if the district court could not have compelled petitioner to testify about the details of her crime, the court still might have been permitted to draw an adverse inference from petitioner's refusal to testify.

165 (6th Cir. 1983) (noting the "majority rule that the privilege is 'proceeding specific' and not waived in a subsequent proceeding by waiver in an earlier one") (citing cases); cf. Ellis v. United States, 416 F.2d 791, 800 (D.C. Cir. 1969) (an individual who testifies before a grand jury without invoking the Fifth Amendment privilege thereby waives the privilege if called as a witness at a trial based on an indictment returned by the grand jury). Accordingly, although a defendant waives the privilege with respect to his own criminal case when he enters a guilty plea, he does not necessarily waive the privilege with respect to separate proceedings against other persons. United States v. Johnson, 488 F.2d 1206, 1210 (1st Cir. 1973).

In addition, as the court below recognized (Pet. App. 10-11), most of the assertedly conflicting cases cited by petitioner appear to have involved prospective witnesses with valid Fifth Amendment claims based upon their exposure to prosecution for other offenses. It was not essential to the outcomes of those cases whether the prospective witness could invoke the Fifth Amendment solely to avoid giving testimony that could increase the severity of his sentence. See, e.g., United States v. Mathews, 997 F.2d 848, 851 n.4 (11th Cir.) (stating that a "convicted, but not yet sentenced, defendant risks * * * additional prosecutions for related conduct"), cert. denied, 510 U.S. 1029 (1993); United States v. Bahadar, 954 F.2d 821, 824 (2d Cir.) (noting that co-defendant's testimony could have been used as the basis for an upward departure at sentencing or "as evidence to support a prosecution on the two

open counts" still pending against him), cert. denied, 506 U.S. 850 (1992); Bank One of Cleveland v. Abbe, 916 F.2d 1067, 1075 (6th Cir. 1990) (stating that witnesses' "Fifth Amendment rights did survive their nolo plea as to the bank fraud charges because they remained vulnerable to further federal and state prosecution").⁷

Petitioner suggests (Pet. 17 n.2) that the existence of additional potential charges does not distinguish the cases from other circuits, because she is also "at risk for prosecution for substantive offenses." As previously noted, however, petitioner did not raise that claim below. The court of appeals expressly decided this case on the assumption that petitioner's testimony would not subject her to prosecution for other offenses. Pet. App. 13. As this Court has recognized, "[t]he validity of [a witness's] justification [for the privilege] depends, not upon claims that would have been warranted by the facts shown, but upon the claim

⁷ See also Garcia, 78 F.3d at 1457 (stating that defendant's testimony after a guilty plea "could have subjected him to further criminal liability," which the court suggested would include, but not necessarily be limited to, the enhancement of his sentence); United States v. De La Cruz, 996 F.2d 1307, 1313 (1st Cir.) (noting that witness's testimony could have inculpated him in "other drug transactions"), cert. denied, 510 U.S. 936 (1993).

The D.C. Circuit has suggested that exposure to prosecution on other offenses is not necessary to support the privilege. See United States v. Lugg, 892 F.2d 101, 103 (D.C. Cir. 1989) (holding that defendants who pleaded guilty could assert privilege to avoid testifying at co-defendants' trial solely to avoid sentence enhancement). We also note that some cases not cited by petitioner allowed an individual who had pleaded guilty but had not been sentenced to assert the privilege at a co-defendant's trial, without indicating whether the individual remained at risk of prosecution on other charges. See, e.g., Lema v. United States, 987 F.2d 48, 55 n.7 (1st Cir. 1993); United States v. Hernandez, 962 F.2d 1152, 1161 (5th Cir. 1992).

that actually was made." United States v. Murdock, 284 U.S. 141, 148 (1931), overruled on other grounds, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

c. Finally, review is not warranted here for two additional reasons. As the decided cases indicate, an individual who has pleaded guilty, but is awaiting sentencing, will usually be able to assert the Fifth Amendment privilege based on a fear of prosecution for other related offenses. Accordingly, the question whether the privilege may be invoked even absent such a fear does not arise with any frequency.

In addition, even if petitioner were held to have a Fifth Amendment privilege to refuse to testify at her sentencing hearing, the outcome of this case would almost certainly be the same. As noted by Judge Michel's concurrence, the case "could be disposed of under the Harmless Error rule," because the evidence amply supports the district court's finding on the quantity of cocaine involved in petitioner's offense, wholly apart from any reliance on her silence. Pet. App. 15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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